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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1162

THE TIMES MIRROR COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Central District of California.

STATEMENT AS TO JURISDICTION.

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STATEMENT AS TO JURISDICTION.

This statement sets forth the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final decree in question and should exercise such jurisdiction pursuant to United States Supreme Court Rules 13(3) and 15.

OPINION BELOW.

The opinion of the District Court is reported at 274 F. Supp. 606. A copy of the opinion is attached to this jurisdictional statement.

JURISDICTION.

The Government filed a complaint in this action in the United States District Court for the Southern District (now Central District) of California in March

1965. The complaint alleged that appellant The Times Mirror Company violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 7 of the Clayton Act, 15 U.S.C. § 18, by acquiring all of the stock of The Sun Company of San Bernardino, California in June 1964.

The District Court announced its decision in this case on October 11, 1967. The District Court held that the acquisition violated Section 7 of the Clayton Act[1] and ordered appellant to submit a plan of divestiture. (App.37) On October 24, 1967, the Government filed a motion to amend the judgment, which motion the District Court denied on November 27, 1967. Appellant filed a notice of appeal in the District Court on December 8, 1967. On December 29, 1967, Mr. Justice Stewart signed an order extending the time to docket this appeal to and including February 26, 1968.

The Supreme Court of the United States has jurisdiction to review the judgment and decree complained of by direct appeal under the provisions of 15 U.S.C. § 29. See, e.g., *Brown Shoe Co. v. United States* (1962), 370 U.S. 294, 304-11.

STATUTE INVOLVED.

The statute involved is Section 7 of the Clayton Act, 15 U.S.C. § 18. The pertinent portion of Section 7 provides as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of

[1]The District Court made no finding with respect to the alleged violation of Section 1 of the Sherman Act (App. 9).

the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

15 U.S.C. § 18.

QUESTIONS PRESENTED.

1. DID THE DISTRICT COURT ERR: (A) BY SUBSTITUTING INDUSTRY DATA FOR MARKET DATA AND POLITICAL BOUNDARIES FOR ECONOMIC BOUNDARIES, CONTRARY TO THE PRINCIPLES WHICH THIS COURT HAS ADOPTED FOR DETERMINING THE BOUNDARIES OF A RELEVANT MARKET; AND (B) BY HOLDING THAT AN INCREASE IN MULTIPLE NEWSPAPER OWNERSHIP AUTOMATICALLY INCREASES CONCENTRATION IN THE NEWSPAPER INDUSTRY EVEN THOUGH THE COMMONLY OWNED NEWSPAPERS DO NOT COMPETE WITH EACH OTHER?
2. DID THE DISTRICT COURT ERR IN CONCLUDING THAT THE TIMES AND THE SUN COMPETED FOR ADVERTISING WHERE THE SOLE BASIS OF THE COURT'S CONCLUSION WAS AN ERRONEOUS INTERPRETATION OF CERTAIN EVIDENCE RELATING ONLY TO NATIONAL ADVERTISING?
3. DID THE DISTRICT COURT ERR IN CONCLUDING THAT THE ACQUISITION RAISED BARRIERS TO THE ENTRY OF NEW DAILY NEWSPAPERS IN SAN BERNARDINO COUNTY WHERE THE COURT FOUND THAT A NEW DAILY NEWSPAPER WAS STARTED IN SAN BERNARDINO COUNTY AFTER THE ACQUISITION AND WHERE THERE WAS NO EVIDENCE THAT THE ACQUISITION OF THE SUN IN ANY WAY INCREASED BARRIERS TO ENTRY EXISTING AT THE TIME OF THE ACQUISITION?

4. WILL THE DISTRICT COURT'S DECISION FRUSTRATE RATIONAL ADMINISTRATION OF SECTION 7?

5. SHOULD THIS COURT RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION IN UNITED STATES v. CITIZEN PUBLISHING CO. BY APPLYING THE MARKET CONCLUSIONS OF THE COURT IN CITIZEN PUBLISHING TO THIS CASE?

STATEMENT OF THE CASE.

The complaint alleged that the acquisition had the probable effect of lessening competition in the newspaper industry. The allegation was based upon the assumption that The Los Angeles Times ("Times") and the San Bernardino Sun ("Sun") were in direct horizontal competition.

At the time of the acquisition, appellant owned two newspapers, the *Times* and the *Orange Coast Daily Pilot*. Appellant was also engaged in other diverse enterprises including book publishing, the manufacture of newsprint, and commercial printing. The Sun Company published the *San Bernardino Sun*, the *San Bernardino Evening Telegram* and the *San Bernardino Sun-Telegram*. These are essentially morning, afternoon and Sunday editions of the same paper (App.5) and will be referred to collectively as the Sun. The Sun Company also owned Acme Colorprint Company, which prints color comics for other newspapers.

The Times is a metropolitan newspaper serving the Los Angeles area. It places special emphasis on the interpretation and development in detail of international, national, regional and state news and issues. (App.14) It also provides specialized coverage of financial news,

entertainment, art, sports and special interest subjects. (App.4) It does not act as a newspaper of record for the Los Angeles area. (App.14) A newspaper of record provides detailed coverage of births, deaths, weddings and similar local news of the type normally provided by a community newspaper. (App.13)

The Sun is a community newspaper (Tr.4160, see App.13) serving the San Bernardino area. While it provides detailed local news of that area (Tr.3676-79, 2344), it provides only wire service coverage of important international and national news. (Tr.3679)

Los Angeles is a city, a county, and a metropolitan urban complex. (Tr.4304-07) The metropolitan complex encompasses much of Los Angeles and Orange Counties, and small portions of Ventura and San Bernardino Counties.

San Bernardino is also a city, a county, and an urban complex, but not in the same sense as is Los Angeles. The San Bernardino urban complex, which includes the City of San Bernardino and such adjacent towns as Colton, Rialto and Fontana, encompasses only a comparatively small portion of the vast land area of San Bernardino County.[2]

The San Bernardino complex is in no sense a suburb of Los Angeles. (Tr.4425-26, 2411, 2704, 2761-62) It is separated from the Los Angeles metropolitan complex by a sparsely populated area of vineyards and barren land. (Tr.4377-79) Strong winds in this area

[2]In 1964, the Los Angeles metropolitan complex had an estimated population of 7,650,792 and encompassed approximately 1,584 square miles. The San Bernardino urban complex had an estimated population of 216,360 and encompassed approximately 89 square miles. San Bernardino County has a total land area of 20,189 square miles.

make residential occupancy undesirable. (Tr.2338-39, 2408, 2704, 2726) Residents of the complex live, work, shop and engage in recreational activities largely within the complex. (Tr.4380-4415) The appropriate boundaries of the two urban complexes are indicated by Exhibit 875 which is reproduced in the appendix. (The dot maps are explained at Tr.4306-24.)

The Pomona-Claremont-Upland-Ontario area, which is located between the cities of Los Angeles and San Bernardino, is a semi-autonomous complex oriented toward the Los Angeles metropolitan complex. (Tr.4448-50) The Census Bureau has designated the Pomona-Ontario complex or subcomplex as a separate urbanized area. (See Exhibit 915 which is reproduced in the appendix.) The county line bisects this subcomplex. Pomona and Claremont are in Los Angeles County; Upland and Ontario are in San Bernardino County. The Upland and Ontario area will be referred to as the western end of San Bernardino County. An aerial photograph showing the Pomona subcomplex, the San Bernardino urban complex and the open-space area between these complexes as of October 20, 1964, is also reproduced in the appendix. A larger version of this photograph was introduced at trial as Exhibit 962.

The circulation patterns of the Times and the Sun closely parallel the population distribution of their separate urban areas. The Times derives the bulk of its circulation from the Los Angeles metropolitan complex with scattered circulation from other parts of California, Nevada, Arizona and Baja California. (See Exhibit 145-7) The Sun derives almost all of its circulation from the San Bernardino complex and small towns in the desert and mountain areas of San Bernardino Coun-

ty. The Sun has only minuscule circulation in the western end of San Bernardino County and does not circulate in the remainder of the Los Angeles metropolitan area.

Daily newspaper circulation is reported on the basis of zones designated by the Audit Bureau of Circulations (ABC).[3] Exhibit 868, which is reproduced in the appendix, is a map showing the ABC Los Angeles City and Retail Trading Zones and the San Bernardino City and Retail Trading Zones. The Los Angeles Retail Trading Zone includes the Los Angeles metropolitan complex, the Pomona subcomplex, some mountain and desert areas of Los Angeles County, and part of the sparsely populated area which separates the San Bernardino urban complex from the Los Angeles urban complex.

The San Bernardino City Zone includes, in addition to the adjoining cities of Colton and Rialto, most of the San Bernardino urban complex except the City of Fontana. The San Bernardino Retail Trading Zone includes, in addition to the City Zone, the cities of Fontana and Redlands, much of the desert areas of eastern San Bernardino County, and the sparsely populated area in western San Bernardino County. It does not include any portion of the western end of San Bernardino County. There is no overlap between the Los Angeles and San Bernardino City Zones. The very small overlap between the respective Retail Trading Zones occurs in the sparsely populated area described above.

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[3]These zones customarily include a City Zone and a Retail Trading Zone which are intended to conform to the shopping habits of residents.

In 1964 the Times derived 88.3% of its average weekday circulation from the Los Angeles Retail Trading Zone (Exhibit 835), 1.2% from the San Bernardino Retail Trading Zone (Exhibits 835 and 898) and 10.5% from all other areas combined. The Sun derived 93.9% of its weekday circulation from the San Bernardino Retail Trading Zone (Exhibit 813) and 6.1% from all other areas. Only 45 copies of the Sun (less than 1/10 of 1% of the Sun's weekday circulation) were sold in Los Angeles County. (Exhibit 88)

In 1964 the Times derived 85.4% of its Sunday circulation from the Los Angeles Retail Trading Zone (Exhibit 836), 1.9% from the San Bernardino Retail Trading Zone (Exhibits 836 and 898) and 13.5% from all other areas combined. Subscriptions to the Sun and the Telegram included the Sunday Sun-Telegram (Tr.359) and consequently Sunday distribution did not differ materially from weekday distribution.

A detailed and uncontroverted study of the circulation distributions of the Times and the Sun demonstrated that regardless of whether the geographic distribution of the two newspapers was defined in terms of mileage from point of publication (Exhibits 815, 816, 821, 822 and 827), circulation per dwelling unit (Exhibits 817, 818, 823, 824 and 828), or circulation per square mile (Exhibits 819, 820, 825, 826 and 829), there was no overlap in their circulations at all until nearly 85% of the cumulative circulation of each was reached. (Tr. 1359, 1387, 1412-13) At this point there were three areas of overlap: (1) the Ontario area; (2) the Beaumont area (in adjoining Riverside County); and (3) the Redlands area. (Tr.1413) In the Ontario area, the Sun had a circulation of 402 and the Times

2,981. In the Beaumont area the Times' circulation was 300 and the Sun's 70, and in the Redlands area the Times' circulation was 1,507 and the Sun's 3,593. (Exhibits 819, 825) The Times' circulation in those areas was 0.6% of its total and the Times' circulation in all of San Bernardino County was 2.1% of its total circulation.[4]

Advertisers usually consider a newspaper's "penetration" in a particular area as a prime factor in selecting a newspaper to cover the area. (Tr. 2583-85) "Penetration" is measured by the number of copies sold per occupied dwelling unit in a given area. For example, if an area contains 100 occupied dwelling units and the Times sells 40 papers in the area, the Times would have a 40% penetration.

In 1964, the Times had a weekday penetration of only 4.5% in the San Bernardino City Zone, compared to a weekday penetration of 63.9% by the Sun. (Exhibits 898, 899) The Times' Sunday penetration in the San Bernardino City Zone was 10.2%, compared to 62.5% for the Sun. (Exhibits 898, 899).

In the western end of San Bernardino County, which is generally oriented toward the Los Angeles urban complex, the Times had a weekday penetration of 14.4% in 1964, compared with 2.1% penetration by the Sun. (Exhibits 898, 899) The Sunday penetration of the Times in this area was 22.2% compared with 2.1% by the Sun. (Exhibits 898, 899) The local community newspaper in this area had a penetration of 49.8% on weekdays and on Sunday. (Exhibits 886, 898)

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[4]The Times had a total daily circulation of 790,255 (App.3) and a San Bernardino County circulation of 16,650. (Tr.360)

The Times' total circulation has generally increased with population growth, but the pattern of distribution has changed very little in recent years. (Exhibits 835, 836, 837) However, the Times' sales in the San Bernardino City Zone have actually declined in relation to population growth. (Exhibit 855)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

This is not a case in which failure to grant full review will merely deny the appellant the only effective appellate review which the law permits. This is not a horizontal merger case. The District Court rejected the Government's contention that the acquisition involved competing newspapers. The decision below is in fact based upon a novel approach to market definition. The criteria which the District Court adopted for determining the boundaries of a "relevant market" represent a radical departure from reason and precedent. The adoption of the District Court's criteria by other courts would drastically alter the application of Section 7 in other cases. Therefore, the decision below requires this Court's attention.

Sections II, III and IV discuss Questions 1, 2 and 3 respectively. Section V treats the more general problems of antitrust law enforcement raised by Question 4 as they relate to this case. Section VI, which parallels Question 5, discusses the conflict between the Court below and the United States District Court for the District of Arizona.

I.

The Times and Sun Do Not Compete.

The complaint alleges that the acquisition lessened competition because "[n]ewspaper readers and advertisers have been and may be deprived of the benefits of competition between the Los Angeles Times and the newspapers of the Sun Company" and because "[c]oncentration in the newspaper business in metropolitan Los Angeles and surrounding areas has been and may be increased to the detriment of actual and potential competition." (Compl. ¶ 15) In other words, the Government contended that the acquisition was a horizontal merger between competing newspapers with a substantial combined share of the same market. This contention was based upon the erroneous assumption that all newspapers are alike and that any two newspapers which are offered for sale to buyers in the same area must compete with each other.

At trial the Government argued that the market in which the Times and the Sun compete is composed of all newspapers sold in San Bernardino County and that the change in concentration which resulted from the merger can be measured by simply adding the Times' percentage of total newspaper circulation in the county and the Sun's percentage of total circulation in the county. Since this total exceeded 30% of the total newspaper circulation in the county, the Government contended that this merger must be *prima facie* unlawful under the test which this Court adopted in *United*

States v. Philadelphia National Bank (1963), 374 U.S. 321, for determining the legality of horizontal mergers.

The Government's arbitrary selection of this vast and highly diverse geographic area gives a grossly distorted picture of the actual overlap in circulation. The actual circulations of the two newspapers are quite distinct. The circulations do not overlap at all until the 85% level is reached. Furthermore, the area which the Government selected includes both the western end (where the Times had a 14½% penetration and the Sun had a 2% penetration) and the San Bernardino City Zone (where the Times had a 4½% penetration and the Sun had a 64% penetration). In view of the western end's economic orientation toward the Los Angeles metropolitan complex and autonomy from the San Bernardino complex (Tr. 4448-50), this area cannot be an appropriate geographic market because these county boundaries do not remotely correspond to commercial realities.

Even if the Government had selected a more appropriate geographic area, it would be impossible to apply the *Philadelphia National Bank* test to this merger. Appellant demonstrated by an abundance of evidence that the Times and the Sun do not compete with each other *in any area.* Therefore, the merger cannot be classified as horizontal and horizontal merger tests cannot be used in this case.

The Government's assumption that all newspapers are interchangeable is erroneous. The newspaper industry differs from most other industries in that the geographic marketing area for a newspaper is not determined by transportation costs from the place of production. Newspapers usually circulate in a smaller area than distribution costs alone would dictate. The reason

is best explained by the cliché that "there is nothing as boring as your roommate's home town paper."

Most community newspapers contain much the same national and international news. In addition, each contains a great deal of news and advertising which are of interest only to persons who live, work, shop or play in the community which the newspaper serves. (Tr. 4115-19) It necessarily follows that demand for most newspapers is essentially local. A newspaper serving one community does not compete with a newspaper featuring news of some other community, and by the same token, it is impossible for a community newspaper to expand its circulation into other communities. (Tr.4130-32) Each community paper is, as the District Court found, a "captive of its community." (App.13).

A metropolitan newspaper such as the Times differs from a community newspaper such as the Sun in two respects. First, while community newspapers generally rely upon wire services for national and international news, metropolitan newspapers provide in-depth coverage of their own. Second, while community newspapers act as newspapers of record for their communities by providing detailed coverage of such community events as club news, births, weddings, and deaths, metropolitan newspapers do not. Metropolitan newspapers confine their attention to news which is of general interest throughout the metropolitan area. (Tr.4120-24, 4145-52)

Readers outside the metropolitan area who buy a metropolitan newspaper use it as a supplementary source for national and international news. For such persons the metropolitan newspaper is not unlike a news magazine such as *Time* or *Newsweek*. It is not a substitute for their local community newspaper.

The testimony of San Bernardino businessmen concerning their advertising policies substantiates the fact that the Times and the Sun are not interchangeable. They noted that the Sun is a much more effective vehicle for their advertising because of its much greater penetration in that market. They emphasized that the Sun is closely identified with the San Bernardino community and the Times is not. (Tr.2698-99, 2722-24) In other words, San Bernardino residents look in the Sun for the advertising of San Bernardino businessmen just as they look in that paper for local news. The identification of the Sun with the people and businesses of San Bernardino can be neither attacked nor emulated by a metropolitan paper such as the Times.

The Times, as would be expected, has its highest penetration in core areas of the Los Angeles metropolitan complex. It has very low penetration in areas such as San Bernardino, Riverside and Santa Barbara which are outside that metropolitan complex. (Tr.4141; Exhibits 823, 829) In those areas it is purchased as a supplementary news source by some persons. The decline in extra-metropolitan circulation of the Times in relation to population growth indicates that the demand for a metropolitan newspaper as a supplementary news source outside its own metropolitan area is declining.

The position of the Times outside of its metropolitan area is similar to that of other metropolitan newspapers. For example, the New York Times is purchased in Philadelphia, Boston, Chicago and other major cities. However, it is in no sense a substitute for newspapers published in those cities.

Economists have devised means for determining whether buyers regard products as substitutes for each

other. If buyers regard products as substitutes, they will shift from one to the other in response to relative price changes, i.e., if the price of A increases and the price of B remains the same, buyers who regard B as a substitute for A will buy more of B and less of A. If buyers do not regard B as a substitute for A, they will not buy more of B. Therefore, it is possible to determine whether buyers regard A and B as substitutes by ascertaining the extent to which sales of B increase when the price of A increases. Economists call this relationship "cross-elasticity of demand" (Tr.1326-32; see also *Brown Shoe Co., supra*, 370 U.S. at 25; Kaysen & Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press, 1959), pp. 27-28)

The Sun increased its price on several occasions between 1940 and 1965 without a corresponding change in the price of the Times. Similarly, there were occasions when the Times changed its price and the Sun price stayed unchanged. Statistical tests and direct observation of the data showed no tendency for the Times' circulation in San Bernardino to rise after increases in the price of the Sun and no tendency for the Sun's circulation to rise after increases in the price of the Times. This was true of increases in both the subscription rates and the street sale prices of the papers. The circulation of the Sun followed closely the population growth of San Bernardino regardless of the relative prices of the two papers. On these facts, the interchangeability or cross-elasticity which is characteristic of competitive products cannot be said to exist. (Tr.1437-51, Exhibits 808, 808A, 855, 856)

In view of the overwhelming evidence that the Times and the Sun are not competing products, the District

Court could not and did not find that these papers compete for circulation. Rather than making an express finding as to competition, the District Court asserted in its opinion that it did not make any difference whether the two newspapers competed or not. For example, the District Court said that the appellant's reliance "upon the 'reasonable interchangeability of use or the cross-elasticity of demand' test of *Brown Shoe* is unfounded" (App.17), that this Court did not hesitate to apply Section 7 in *Federal Trade Commission v. Procter & Gamble Co.* (1967), 386 U.S. 568, even though the products could not in any degree be considered as substitutes for each other (App.18), that the "fact that two merging companies presently compete or do not compete is not the significant issue" (App.18), and that "the concept of two products being complementary toward each other is not a barrier to Section 7" (App. 23):

It is apparent that the District Court *rejected* the Government's basic contention that the merger eliminated circulation competition between the Times and the Sun. The District Court ignored this Court's requirement that "an area of effective competition" be established and substituted some theory of its own as a justification for declaring the acquisition unlawful.

This appeal does not present the same questions which were presented at the trial below. Rather, it is based upon errors of law which the District Court committed after it rejected the Government's erroneous contentions of fact.

II.

The District Court's Decision Is Based Upon the Erroneous Assumption That Markets and Industries Are Synonymous.

Although the District Court rejected the Government's contentions of fact, it did accept the Government's suggested conclusions of law. The District Court concluded that the acquisition is *prima facie* unlawful under the *Philadelphia National Bank* test (App.23, 32), which case clearly involved competing firms. It also concluded on the basis of data on the decline in the number of "independently owned" newspapers that mergers between owners of newspapers have contributed to a trend toward concentration in the newspaper industry and that this acquisition should be prohibited in order to discourage that trend. (App.31-32). At the same time, the District Court did not make factual findings upon which those suggested conclusions were based.

The District Court did not find that the Times and the Sun compete with each other for circulation in San Bernardino County. Neither did it find that other newspapers sold in San Bernardino County compete with each other or with the Times or with the Sun. The District Court nonetheless declared that all daily newspapers sold in San Bernardino County constitute an appropriate market in which to measure the effects of this acquisition. It then declared that the Times' and the Sun's combined share of daily newspapers sold in San Bernardino County is a meaningful market share for purposes of the *Philadelphia National Bank* test.

The District Court's discussion of "Concentration in the Industry" (App.29-33) reveals that the District Court concluded that a decline in the number of inde-

pendent newspapers is equivalent to an increase in concentration. The District Court did find that the number of independent newspapers in Southern California has decreased, but it did not find that any of the newspaper owners who purchased formerly independent newspapers actually owned newspapers which competed with the newspapers they purchased. The District Court did not find that merging newspapers other than the Times and the Sun even circulated in the same areas. Since concentration is measured within markets composed of competing entities, the District Court's conclusion that the growth of multiple ownership of noncompeting newspapers automatically increases concentration is incorrect. This Court, in analyzing the possible effects of a merger on concentration, has always emphasized the importance of appropriate market definition. The District Court's novel approach in this case has no support in the law.

The District Court has equated "market" with "industry" and has substituted data on sales by members of an industry for market shares. It has substituted data on the number of independent entities in an industry for data on the number of sellers in a market. The District Court's premise is most clearly revealed in its discussion of the "product market." After declaring that competition, substitutability, interchangeability of use, and cross-elasticity of demand are not of significance, the Court proceeded to list the "practical indicia" which it considered important for the purpose of determining whether daily newspapers constitute a market for Section 7 purposes. These "practical indicia" consisted of the fact that all newspapers "utilize unique methods of production, distribution and pricing," (App.

20), the fact that all daily newspapers provide a cluster of services including "a daily written record of current events and reference information" (App.20), the fact that newspaper advertising is different from that in other media and provides the only medium for grocery and department store advertising (App.20-21), and the fact that newspapers have their own trade associations and trade journals. (App.21)

The District Court did not consider the fact that different newspapers may carry different reference information or different grocery and department store advertisements to be of any practical significance in determining the boundaries of the product market. The District Court concluded that the only significant difference in newspapers for Section 7 purposes is the fact that some are published at different times. (App.21, 22) Thus, the District Court would ostensibly include the *Washington Post* and the *San Bernardino Sun* in the same submarket, but would not include the *Washington Post* and the *Washington Star* in the same submarket. It would not even include the *San Bernardino Sun* and the *San Bernardino Telegram* in the same submarket even though the two editions contained the same features and advertising and were generally identical except for spot news.

The District Court has really described the attributes of an "industry." Although the word "industry" has no clearly fixed meaning, it is usually used to describe a group of enterprises which employ much the same production and distribution techniques and produce products with common characteristics. The personnel generally feel that they are engaged in essentially the same business. The distinguishing feature may be

the use of the same raw materials (as in the steel industry or the aluminum industry) or the use of similar component parts (as in the appliance industry) or the production of a common class of products (as in the machine-tool industry or the furniture industry). But in any case, in defining an "industry," the focus is placed upon the seller's common activities or common problems rather than on their selling substitute products in the same geographic market.[5]

Courts and economists have looked at buyers in defining markets and have attempted to define markets to include buyers and sellers of products which serve the same purposes for the same buyers. Thus, a chair manufacturer and a bed manufacturer may be part of the same industry, but not a part of the same market. Can and bottle manufacturers may be in different industries and yet be in the same market. A Maine grocer and an Oregon grocer are clearly part of the same industry, but they are not in the same market because the Maine grocer cannot fulfill any of the needs of an Oregon housewife.

If the District Court had followed the traditional approach to market definition, it would have recognized that the Times and the Sun cannot be included in the same market and that the *Philadelphia National Bank* test is not applicable to this case. A combined market share cannot be correctly computed for companies which

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[5]See Kaysen and Turner, *Antitrust Policy: An Economic and Legal Analysis* (1959), pp. 100-103, for a general statement of the need to consider geographic dimensions of supplier-customer relations in defining a market. The Statistical Appendix of this book, pp. 273-291, shows the adjustments made to industry concentration ratios to account for, among other things, the geographical extent of the market. At p. 285, newspapers are listed as having "metropolitan area or city" as geographic markets.

are not sellers in the same market. In other words, if the District Court had followed traditional and logical analysis, it would have realized that the acquisition in question is an intra-industry conglomerate merger rather than an intra-market horizontal merger.[6] The criteria which this Court has developed for the purpose of determining the legality of horizontal mergers cannot be used to determine the legality of this merger.

By the same token, the District Court should have also realized that data on the decline in the number of independents is of no significance in the absence of a showing that: (a) newspaper mergers increased concentration within particular newspaper markets by bringing competing newspapers under common ownership, or (b) multiple ownership of newspapers in different markets confers some advantage on commonly owned newspapers which might indirectly increase concentration within individual markets. Neither of these showings was made. The District Court should not have concluded, as it did, that the sole fact of multiple ownership automatically increases market concentration.

The District Court may have felt that owners of more than one newspaper have too much power in influencing public opinion and that multiple newspaper ownership reduces competition in ideas. Such considerations are clearly irrelevant to the purposes of Section 7. Section 7 is concerned with power to control prices and competition between sellers of substitute products, not with power to influence opinion and competition in

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[6]Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," 78 *Harv. L. Rev.* 1313, at 1315, refers to intra-industry inter-market mergers as "mixed conglomerates", which "include acquisitions of a firm producing the same product as the acquirer but selling it in a different geographic market. . . ."

ideas. It would clearly be improper to use Section 7 as a device for preserving the balance of political power. If multiple ownership of newspapers is to be restricted for that purpose, it must be done under a statute which is drafted to accomplish that objective.

Moreover, the First Amendment would preclude either Congress or the courts from restricting multiple ownership in order to limit the power to influence public opinion. The First Amendment obviously would not permit the state to deny any person the right to publish one newspaper in order to prevent him from influencing public opinion. The same constitutional policy prohibits the state from denying any person the right to publish more than one newspaper in order to prevent him from enhancing his influence on public opinion.

The District Court's decision in this case is based upon an erroneous premise and justice requires that the decision below be reversed.

III.

The District Court's Decision Cannot Be Sustained on the Theory That the Merger Eliminated Competition for Advertising.

In a comment apart from the principal consideration of legal standards for determining the degree of competition between the Times and the Sun for circulation, the District Court did conclude that there was some competition for advertising between them prior to the merger. It would appear from the brevity of this discussion and from the District Court's strong position concerning the irrelevance of competition that this is not paramount in the decision. In any case, it is an erroneous conclusion.

Advertising markets are distinct from circulation markets. Newspapers sell advertising to different buyers for different purposes. The boundaries of these product markets must be determined by the same criteria, i.e., whether advertisers regard various media as substitutes. The evidence amply demonstrates that no group of advertisers regard advertising space in the Times as a substitute for advertising space in the Sun.

Purchasers of retail and classified advertising are interested only in reaching potential customers in their own area. The evidence shows that the Sun is useless for a retail or classified advertiser who wants to reach customers in the Los Angeles area; it has virtually no circulation there. The Times is almost equally useless to an advertiser who wants to reach San Bernardino customers; the Times has inadequate penetration in that area, especially as compared with the Sun. In 1964, had a retailer chosen to use the Times, he would have reached far fewer readers and would have incurred costs per reader 53 times greater on weekdays and 29 times greater on Sundays than would be the case had he chosen the Sun. (Exhibit 809) Several San Bernardino businessmen testified at trial that they had never considered using the Times for this purpose. (Tr.2695-98, 2721-24, 2747-50) None testified that he had or would use the Times to reach San Bernardino customers.

The opinion below does not mention retail and classified advertising. Under the circumstances, the District Court's silence must be interpreted as a finding that the Times and the Sun do not compete for retail and classified advertising.

The District Court did conclude that there was competition between the Times and the Sun for national

advertising. Uncontradicted testimony in the record demonstrates that this is not the case. National advertisers or their agencies first select local markets to be covered and then select media to cover those markets. (Tr.2609-15) National advertisers use the same criteria as retail and classified advertisers in selecting a newspaper to cover a particular local market—i.e., penetration (sales per household) and the cost per household of covering that market. (Tr.2583-88, 2603-06) The Times' low penetration and high cost in the San Bernardino complex would make it as ineffective and as costly for a national advertiser for reaching that market as it is for retail and classified advertisers with the same purpose.

An advertising agency executive testified that he would never recommend the Times for a client who wanted to cover the San Bernardino market. (Tr.2603) The evidence also showed that the Times and the Sun had used the same national representative to sell national advertising for them for many years prior to the acquisition. (Exhibit 145-21) Neither the Times' personnel, the Sun's personnel, nor the agency's personnel felt that this arrangement created any conflict of interest. (Tr.2253, 2333-37, 3171-72) All recognized that an advertiser who wanted to cover both markets would be likely to use both papers and that an advertiser who wanted only to cover major metropolitan markets would not use the Sun in any case. (Tr.2406-07)

The District Court did not say that the Times was an adequate substitute for the Sun for a national advertiser's purpose. The District Court said that some national advertisers *thought* they could cover the San Bernardino market through the Times and that the ac-

quisition eliminated competition for their business. (App.24) Thus, the District Court found that the advertising competition was limited to uninformed national advertisers. There is no evidence that such uninformed national advertisers in fact exist.

The Times' advertisement which the District Court cites (App.24) was intended to persuade advertisers that the Times is a good bargain compared to a group of other papers. (Tr.3270-72) The joint national advertising campaign of the Sun and the Riverside paper, to which the District Court also refers, was—and is still—intended to show advertisers that they should attempt to cover the San Bernardino and Riverside markets. These advertisements do not support the inference that a substantial number of advertisers actually believe they can cover the San Bernardino market through the Times.

These advertisements are insufficient to overcome the direct evidence that businessmen spend their advertising budgets in a rational manner by selecting those media and, within media, those newspapers which provide the greatest sales return per dollar of advertising expenditure. In these terms the Times and the Sun are not reasonable alternatives for national advertising in any markets. Their patterns of circulation are far too distinct and the differences in their costs are far too great for them to be considered as substitutes by national advertisers.

IV.

The Decision Cannot Be Justified on the Theory That the Merger Enhanced Entry Barriers.

The District Court held that the acquisition "has raised a barrier to entry of newspapers in the San Bernardino County market" and that this market "has now been closed tight and no publisher will risk the expense of unilaterally starting a new daily newspaper there." (App.33) The most compelling evidence that the District Court's conclusion is incorrect is that a daily newspaper commenced publication in Victorville, a community in the desert area of San Bernardino County and within the District Court's definition of the geographic market, after the merger. (Tr.3959-64) The Victorville paper is still publishing at this date, and the District Court even referred to the Victorville paper later in the Opinion. (App.36)

The District Court's reliance upon *Federal Trade Commission v. Procter & Gamble Co.* is misplaced. The present case does not present analogous problems. Proctor & Gamble wished to enter the liquid bleach market and chose to do so by buying Clorox rather than by entering directly with its own product. There is no parallel to this in the Times' decision to purchase the Sun. It would not alternatively have entered the San Bernardino market with a product similar to the Sun.

This Court's conclusion that Procter & Gamble could transfer its market power in the distribution of soaps and laundry products to the bleach market by purchasing Clorox was based upon the Federal Trade Commission's exhaustive examination of the nature of that particular industry. There is no evidence in this record which would indicate that the Times could transfer

market power to the Sun. The Government's failure to present such evidence must be attributable to the fact that it is impossible to transfer market power from one newspaper market to another.

The District Court did observe that two newspapers in San Bernardino County were sold to different owners after appellant acquired the Sun Company and that two other newspapers shifted from daily to weekly publication. (App.32) There is no evidence that any of these events resulted from the acquisition of the Sun. Neither do these events indicate that the merger has increased entry barriers in San Bernardino, especially in the face of the commencement of daily publication in Victorville. There is no evidence that any of these newspapers competed with the Times and no evidence that the acquisition in any way changed the competitive relationships they may have had with the Sun. The record shows that the Colton newspaper prior to the merger had attempted and failed to sustain daily publication. (Exhibit 145-33, App. F) The Sun had sufficient penetration in Colton and Rialto before the acquisition to saturate these towns effectively. (See Tr. 2342, 3594) The communities of Colton and Rialto are contiguous to the City of San Bernardino and are included within the San Bernardino ABC City Zone. There is no evidence that the Sun's coverage of these or other local markets was affected by the merger.

Some evidence which the appellant introduced for other purposes would justify the inference that the entry barriers in the Sun's market were in fact very substantial before the acquisition. The evidence showed that newspapers derive most of their revenues from advertising. (Tr.3226) Advertising experts testified that

advertisers will not consider using a newspaper which has less than 25% to 30% market penetration. (Tr. 3186-87) Since the Sun had already saturated the San Bernardino market, a second community newspaper would have to capture perhaps as much as one-third of the Sun's circulation in order to survive. This would be enough to discourage any prudent businessman.

The existence of substantial entry barriers in San Bernardino does not, however, justify prohibiting the acquisition in the absence of some basis for concluding that these barriers were probably substantially enhanced by the merger. Since the entry barriers were obviously so high and the inhibiting effect of threat of entry so minimal *before* the acquisition, it is inconceivable that the acquisition could have resulted in a substantial enhancement of entry barriers.

V.

The District Court's Erroneous Approach to Market Definition Will Frustrate Rational Administration of Section 7.

The District Court's erroneous approach to market definition permeates the entire opinion. The effect of the District Court's reliance upon an industry attributes test is most evident in the District Court's attempt to apply the *Philadelphia National Bank* test to noncompeting entities and to measure concentration in five-county and ten-county "markets" composed of newspapers which do not even circulate in the same areas.

The District Court's equation of a decline in the number of independently owned newspapers with an increase in concentration is also the result of the confu-

sion of markets and industries. The District Court's discussion of advertising competition and entry barriers reflects the same basic error. The District Court failed to recognize that advertising markets are distinct product markets and accordingly made no attempt to identify the advertising market in which the Times and the Sun supposedly compete or to estimate the market share which is attributable to uninformed national advertisers. The District Court's failure to recognize that entry barriers in the Sun's market were substantial prior to the acquisition and were not affected by the acquisition must be attributed to the District Court's error in market definition.

The market definition question presented by this case involves a good deal more than quibbling over "metes and bounds." The traditional criteria for market definition are directly related to the economic objectives of antitrust policy. The criteria which the District Court adopted are irrelevant to those objectives. Application of the District Court's criteria in other cases would make correct results in determining legality or relief a matter of accident.

Courts have attempted to determine whether a particular merger will enhance the market power of some seller in determining whether such a merger violates Section 7. This traditional concern with market power is a product of certain fundamental assumptions of classical economics, to wit, that it is desirable to give people what they think they want, that the optimum allocation of available resources in terms of consumer preference is most likely to result when the prices of commodities are determined by supply and demand, and that a seller who has undue market power is likely to deviate from the supply and demand price.

The factors which determine a seller's market power include the number of competing sellers, the distribution of sales among sellers, the existence of potential sellers, and relationships which might cause a buyer to become a captive customer of some seller or sellers. The market concept is an essential analytic tool in determining a merger's effect upon such factors. It is impossible to count the existing sellers, to measure the degree of concentration, to determine whether the number of sellers or the degree of concentration has been increasing or decreasing, or to ascertain two sellers combined share of total sales without determining the boundaries of a market. It is also impossible to identify potential sellers and to determine the probable effects of a merger upon potential competition without isolating the product such a potential seller might sell, the buyers whom he might serve, and the sellers who might be his rivals.

This Court acknowledged that this method of analysis is dictated by the nature of the inquiry when it said in *Brown Shoe* that "[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act." 370 U.S. at 324. Opinions in subsequent cases follow that dictate. For example, in *Procter & Gamble Co., supra,* this Court first found that the bleach market is the relevant market and then concluded that the merger should be prohibited because it would affect potential competition and concentration in that market.

Precedent and reason require that market boundaries be defined in terms of sellers who offer reasonably interchangeable commodities which buyers regard as substitutes. The forces of the marketplace ultimately de-

termine which sellers are in the same market. If buyers believe that products are reasonably interchangeable for their purposes, they will regard the products as substitutes for each other and will shift from one to the other in response to relative price changes in a manner which economists describe as the "cross-elasticity of demand." Therefore, the sellers of such products will be forced to consider the pricing policies of sellers of substitute products. They will not be forced to compete with the sellers of other products. Thus, market boundaries are fixed by buyer attitudes and preferences.

The market concept can only serve as a useful analytic tool if market boundaries are defined in accordance with the substitutability standard. Defining markets in this way will lead to a reasonably accurate count of rival sellers, a reasonably accurate measurement of sales shares, and a reasonably accurate measurement of purchase shares of different buyers. Such market definition does not, in itself, identify potential sellers, but it does provide some basis for determining the difficulties which a potential seller would encounter in producing or acquiring a substitute product and persuading buyers to purchase from him rather than existing sellers. It is then possible to assess which potential entrants, if any, would be most likely to have both the incentive and the ability to overcome these difficulties. In the same way, it is possible to assess the effects of a particular merger on potential entrants. The determination of the effects of a merger on potential competition rests as critically on proper market definition as does the determination of the effects on actual competition.

This Court has long recognized that substitutability is the only logical criterion for the determination of

market boundaries for antitrust purposes. For example, in *United States v. Du Pont & Co.* (1956), 351 U.S. 377, the Court held that all substitutes for cellophane must be considered as part of the relevant market for the purpose of determining Du Pont's market share. The Court reaffirmed this rule for determining market boundaries when it said in *Brown Shoe Co., supra,* that the "outer limits of a product market are determined by the reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it." 370 U.S. at 336.

The District Court refused to be bound by reason and precedent and held that substitutability or reasonable interchangeability or cross-elasticity of demand or competition among sellers is not the test for purposes of market definition. It substituted industry data for market data and political boundaries for economic boundaries. This led to the errors discussed in the preceding sections.

Adoption of the District Court's criteria would make rational enforcement of Section 7 impossible. Section 7 requires the determination of the substantiality of the anticompetitive effects of a merger. The use of the District Court's criteria in other cases would preclude such determinations. While a market need not be defined with the accuracy of a surveyor's measure for Section 7 purposes, it must be defined to include products which, with geographic, price and use factors considered, are in effective competition. Only when this minimal requirement is met is it possible to assess whether a merger "may substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country."

The use of an industry test would obscure competitive relationships. In many instances firms in the same industry do not produce competing products while firms in other industries may do so. This Court has considered inter-industry competition in defining markets for glass and metal containers, aluminum and copper wire and cable and cellophane and other flexible wrapping materials. This Court has considered product and geographic differences within industry structures in defining markets for first and subsequent run movies, championship and other boxing events, retail food distribution, fabricated metal products and bituminous coal. The adoption of the District Court's criteria would have produced different results in such cases.

Reliance upon the District Court's criteria would also make it impossible for a court to tailor relief to actual problems. No court can frame a divestiture plan which will adequately serve the objectives of antitrust policy unless it has a reasonably accurate understanding of the structure of the markets in which the company buys and sells.

Thus, the adoption of the District Court's criteria for market definition would not alter the "vigor" of Section 7 enforcement. There is no reason to believe it would necessarily lead to more or fewer findings of illegality or more or less drastic remedies. It would, however, preclude intelligent selection of mergers to be approved or condemned and intelligent selection of remedies. Vigorous enforcement cannot accomplish the objectives of Section 7 in the absence of intelligent selection.

VI.

The Decision Below Is in Direct Conflict With the Decision of Another United States District Court.

The District Court's erroneous approach to market definition has resulted in a conflict between its decision and the decision for the United States District Court for the District of Arizona in *United States v. Citizen Publishing Co.* (No. Civ.—1969 Tucson). The District Court in *Citizen Publishing* defined the market in which the *Arizona Daily Star* and the *Tucson Daily Citizen* are sold in order to evaluate the competitive impact of a 1940 joint operating agreement between the owners of those newspapers and the effect of the subsequent acquisition of the Star by the owners of the Citizen. The market findings and conclusions of law of the District Court in *Citizen Publishing* are reproduced as Appendix B.

The *Arizona Daily Star* is comparable to the *San Bernardino Sun* and the *San Bernardino Sun-Telegram* in that it is the only morning daily and the only Sunday newspaper which provides complete local news and local advertising of the Tucson urban complex. The *Tucson Daily Citizen* is comparable to the *San Bernardino Evening Telegram* in that it is the only evening daily which provides similar local coverage. Several out-of-town newspapers circulate in Tucson and in San Bernardino. The *Los Angeles Times* offers home delivery in both areas (Exhibit 145-7) and derives some of its extra-metropolitan circulation from both areas.

The total circulation of the local papers far exceeds the total circulation of the out-of-town newspapers in both areas.

In its product market findings, the District Court in *Citizen Publishing* recognized that daily newspapers comprise a distinct industry. (Findings of Fact 73-80, 83, 93-95, 104, 109, 110). Unlike the Court below, it did not conclude that all daily newspapers must be included in the same product market because they are in the same industry. It concluded, for the precise reasons urged by appellant, that even daily newspapers which circulate in the same area cannot be included in the same product market if their contents are different.

The District Court in *Citizen Publishing* found that "[d]aily newspapers, weekly newspapers, radio, television and magazines all supply to the public news and advertising content" (Finding of Fact 83) and that ". . . the Arizona Republic, the Phoenix Gazette, the Sun News, Arizona Currents, Los Angeles Times, the New York Times, the Wall Street Journal and others are distributed within the Star-Citizen circulation area and disseminate news and advertising matter. . . ." (Finding of Fact 112). However, that Court also found that "[n]one of these newspapers provides the same coverage as do the Star and Citizen" (Finding of Fact 112) and that "[t]*he other daily newspapers of general circulation, which are circulated in Tucson do not carry Tucson news and information of only local interest, and, accordingly, are not substitutes for the Star and Citizen.*" (Finding of Fact 70, emphasis added).

That Court also concluded that the price behavior of buyers and sellers is of great significance in determining product market boundaries. Without specifically measuring the cross-elasticity of demand, it found that "[n]o appreciable part of [the] readers would discontinue their reading of the Star and Citizen by reason of an increase in circulation rates of the papers. . . ." (Finding of Fact 124) and accordingly found that the publishers of the Star and Citizen "have power over price with respect to the circulation of their newspapers." (Finding of Fact 125).

The District Court in *Citizen Publishing* also considered markets for advertising separately from markets for circulation. It found that "[a]dvertisers and advertising agencies in selecting media give consideration to cost" (Finding of Fact 142) and that "[e]ach of the major advertising media in the Tucson area measures the coverage of its respective medium in the cost per thousand persons reached and uses these costs, plus the distinctive features of its medium, to compete for the advertising dollar." (Finding of Fact 141). It made several other findings which indicate that the product markets for advertising extend to radio, television and other media (Findings of Fact 145-150), even though Tucson newspaper advertising may be a distinct submarket (Findings of Fact 151-181). It did not find that newspapers published outside and circulating inside Tucson compete with the Tucson papers for any kind of advertising.

The District Court in *Citizen Publishing* found that the Tucson Standard Metropolitan Area (Pima County) is an appropriate geographic market. This finding was based on economic reality rather than arbitrarily selected political boundaries. The District Court in *Citizen Publishing* found that "*[s]ince 1945, in excess of 80% of the combined daily circulation of the Star and Citizen has been in Pima County,*" (Finding of Fact 183, emphasis added), that Pima County "is considered by advertising agencies in Tucson to be the limits of their trading area" (Finding of Fact 185) and is "an integrated economic and social unit with a recognized large population nucleus." (Finding of Fact 182).

The conflict between the decision below and the *Citizen Publishing* decision demonstrates the reasons why the decision below should be reversed. If the District Court for the Central District of California had defined the relevant markets as the District Court for the District of Arizona did, it would have found that:

1. The Times and the Sun do not compete for either circulation or advertising.

2. The Times does not provide the same coverage of news as does the Sun.

3. The Times does not carry San Bernardino news and information of only local interest.

4. No appreciable part of the readers has discontinued reading one or the other of the newspapers because of changes in their relative prices.

5. The Times and the Sun have radically different advertising costs per thousand persons reached and vary drastically in their advertising effectiveness.

6. Advertisers do not regard them as substitutes.

7. More than 80 percent of the Times' circulation comes from the Los Angeles metropolitan urban complex. More than 80 percent of the Sun's circulation comes from the San Bernardino urban complex.

8. Los Angeles and San Bernardino are separate economic and social units.

9. No geographic area exists in which the Times and the Sun are in effective competition.

10. There being no common geographic and product market, no increase in concentration resulted from the acquisition.

11. Because of their distinct markets, the acquisition did not result in increased entry barriers or in a lessening of potential competition among any newspapers.

These two District Courts reached different conclusions in determining the same questions on very similar facts because they adopted fundamentally different interpretations of Section 7. This Court should resolve that conflict.

CONCLUSION.

For the foregoing reasons, this Court has jurisdiction of this appeal.

Respectfully submitted,

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